IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 911, 912, 913

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION, AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

BRIEF FOR GRAND TRUNK WESTERN RAILROAD COMPANY AND TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN C. SLADE,
FRANK H. TOWNER,
BRYCE L. HAMILTON,
38 South Dearborn St.,
Chicago, Illinois,
H. V. SPIKE,
441 E. Jefferson Ave.,
Detroit, Michigan,
Attorneys for Respondent Grand Trunk Western Railroad Company.

COPE J. HANLEY,
B. G. STACKHOUSE,
608 South Dearborn St.,
Chicago, Illinois,
Attorneys for Respondents Holman D. Pettibone, et al., Trustees of Chicago, Indianapolis & Louisville Railway Company.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 911, 912, 913.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DERAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION, AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

BRIEF FOR GRAND TRUNK WESTERN RAILROAD COMPANY AND TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

MAY IT PLEASE THE COURT:

The petitioners' presentation of the subject matter and issues involved in the litigation in the Court of Appeals, and of the questions presented and decided in the decision

and judgments of which a review is sought, requires clarification in certain particulars.

The Nature of the Issues.

In the Court of Appeals, as in the District Court, five main controversies, or "issues," were presented for determination. All of them pertained to the apportionment, among the railroad shareholder-lessees of Chicago and Western Indiana Railroad Company, of the expenses involved in the conduct of the Western Indiana terminal, located in Chicago and adjacent Illinois territory. These five "issues," some of which embraced several distinct items of expense, were designated: (1) Disputed Rentals, (2) Grand Trunk Payment, (3) Western Indiana Separate Railroad Operations, (4) Miscellaneous Charges and Expenses, and (5) Management Expense.

The decision of the Court of Appeals of which the petitioners seek review (rendered March 17, 1943, and modified January 21, 1944) was confined to the first four of the issues above enumerated (R. 710-21; 944-47): the fifth issue, "management expense," was dealt with in a separate opinion, filed March 19, 1943 in Appeal No. 7878 (Appendix to Petition 12).

The Questions Presented.

Upon the four issues considered in the March 17th opinion, the ultimate question for decision was the same. In the language of the Court (R. 716), that question was,

> "How should these expenses be distributed, on a wheelage basis, or equally?"

Otherwise stated, the controversy as to all of these four classes of expenses concerned only the *basis* of dis-

tribution, as between "wheelage" and "equal," among the five shareholder-lessees. No question as to the *method* of calculating the "wheelage" proportions of these expenses was presented to the Court of Appeals, or decided, upon this branch of the case.

The "management expense" issue involved an entirely distinct question. The "management expenses" were admittedly distributable on the basis of wheelage. The question there was the *method* to be followed in calculating the respective proportions, on a wheelage basis, that the several shareholder-lessees of Western Indiana should pay. And *this* question was confined to the "management expense" issue, and hence was considered and dealt with by the Court of Appeals only in the separate opinion of March 19, 1943 in Appeal No. 7878 (Appendix to Petition 12).

All five issues turned upon the construction and application of pertinent provisions of leases and agreements to which Western Indiana and its shareholder-lessees were parties, but the controlling provision upon the "management expense" issue was a different provision from those upon which all the remaining issues depended.

The only contractual provision involved in the "management expense" issue was a certain clause in paragraph 33 of the 1902 Lease which provided for the distribution of the wheelage expenses among the shareholder-lessees in proportion to their "wheelage uses" of various sectional divisions of the terminal property. The complaint concerning the method of distribution employed by Western Indiana was that it was inequitable with respect to the portion of wheelage expenses designated as "management expenses," because it failed to give effect to the varying costs of service in the different sections. The clause which gave rise to the "management expense" issue appeared for

the first time in the 1902 Lease.* Consequently, there was no question presented of whether this clause in any way superseded or conflicted with some earlier contractual provision.

On the other hand, the questions concerning the basis of distribution, as between "wheelage" and "equal," of the expenses dealt with in the opinion of March 17, 1943, turned initially upon which of the many provisions in the contractual structure relating to the expenses to be paid on a wheelage basis is controlling. On this question petitioners contended, and the District Court held, that since July 1, 1902, paragraph 33 of the 1902 Lease has been the only agreement of the parties defining and controlling the expenses for which Western Indiana is to be reimbursed directly by the five shareholder-lessees (Appendix to Petition 30). These respondents contended, and the Court of Appeals decided, that the definition of "working expenses" contained in paragraph 6th of the 1882 Intertenant Agreement still controls the determination of what expenses of Western Indiana are distributable on the wheelage basis, and reversed the decision of the District Court to the contrary.

For the convenience of the Court, we include as an Appendix paragraphs 5th and 6th of the 1882 Intertenant Agreement, excerpts from a typical supplemental lease made concurrently with the Intertenant Agreement, and paragraph 33 of the Joint Supplemental Lease of 1902.

---

* The Agreement of November 1, 1891, which was cancelled by the 1902 Lease (R. 233), contained a similar provision for distributing certain interest charges on the wheelage basis (R. 219), and was confined to that subject.

SUMMARY OF ARGUMENT.

I.

The point in the litigation which the Court of Appeals decided adversely to petitioners was whether the definition of "working expenses" in paragraph 6th of the 1882 Intertenant Agreement had been superseded by paragraph 33 of the 1902 Lease. The Court's reliance on paragraph 37 amounted to no more than a reason for the decision on that point. The question presented was purely one of contract construction, and no court is bound to rest its conclusion on a purely legal question on the reasons advanced by the litigants.

Petitioner's contention that the decision of the Court of Appeals on the point in question was rendered on a "patently erroneous" theory necessarily proceeds upon the view that the 1882 Intertenant Agreement could not for any purpose be regarded as within the reference to "said existing leases" in paragraph 37 of the 1902 Lease. The fact is that the Intertenant Agreement of November 1, 1882, and the supplemental leases of the same date were interrelated. Under Illinois law when two or more instruments relating to the same general subject matter are executed contemporaneously between the same parties, they may properly be construed together as one contract.

In the final analysis, the Court's conclusion that paragraph 33 of the 1902 Lease did not supersede paragraph 6th of the 1882 Intertenant Agreement is not dependent on paragraph 37 of the 1902 Lease; for, unless paragraphs 33 and 6th are in conflict, there is no basis for a contention that the later paragraph superseded the earlier one. No such conflict exists.

The function of paragraph 6th was to provide a comprehensive definition of the "working expenses" of Western Indiana which were payable by its shareholder-lessees on a wheelage basis. Paragraph 33 did not provide a *definition* of such expenses. It merely listed by categories the expenses payable on a wheelage basis, as had been done in prior leases, including the supplemental leases executed concurrently with the 1882 Intertenant Agreement. The shareholder-lessees acquired the capital stock of Western Indiana in equal one-fifth proportions on November 1, 1882, and the Intertenant Agreement which they executed on that date is the only contract between the shareholder-lessees which *defines* the expenses to be paid by them on a wheelage basis and deals with their interests as equal owners.

II.

The ultimate question stated by the Court of Appeals, when its opinion is properly read, was whether any of the provisions of the 1902 Lease had abrogated the definition of "working expenses" in paragraph 6th of the 1882 Intertenant Agreement; and this question was decided by the Court.

III.

There is no conflict between the decision of the Court of Appeals here challenged and its decision in the Erie appeal. The decision in the Erie appeal was grounded on a clause in paragraph 33 of the 1902 Lease which had no counterpart in the 1882 Intertenant Agreement, and which related to the *method* of allocating wheelage expenses among sections. This clause was merely by way of supplement to paragraph 5th of the 1882 Intertenant Agreement, and in no way changed the definition of "working ex-

penses'' in paragraph 6th of that agreement. The alleged conflict within the challenged decision itself is not one of which petitioners are entitled to complain.

IV.

There is no merit to the suggestion that if this Court will take the case and reverse the Court of Appeals it will not be necessary for the District Court to determine several subordinate questions which petitioners assert (erroneously, we submit) have not been decided.

V.

The questions presented are questions of the substantive law of Illinois. Petitioners have not cited any Illinois decision with which the decision of the Court of Appeals could possibly be said to conflict.

ARGUMENT.

Reply to Point I (Petition 20-1; Brief 8-17).

The first reason assigned by the petitioners as a ground for the allowance of the writ fails to distinguish between the determination of a point in the litigation and the process of reasoning by which the decision of the point is reached. The "point" to which the petition and brief refer, and which the Court of Appeals decided adversely to the contention of the present petitioners, was whether the definition of "working expenses" in paragraph 6th of the Intertenant Agreement of November 1, 1882, had been superseded by paragraph 33 of the Joint Supplemental Lease of 1902.

This point had been presented and argued in the District Court. The District Court had decided the point in accordance with the contention of the present petitioners, and an important part of the argument in the Court of Appeals was directed to the question of whether that decision of the District Court was correct. (See briefs certified to this Court.) What the Court of Appeals *said* in reaching a conclusion contrary to that of the District Court amounted to no more than a statement of the course of reasoning which the Appellate Court regarded as decisive.

There is no possible analogy between the situation thus presented and that in the case of *Le Tulle* v. *Scofield*, 308 U. S. 415, where this Court took the case because the Court of Appeals had allegedly "based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence." The question of whether paragraph

33 of the 1902 Lease had superseded paragraph 6th of the 1882 Intertenant Agreement depended wholly upon the construction of the provisions of written contracts, and the answer to the question was in no way dependent upon the introduction of evidence.

In deciding purely legal questions, no court is bound to rest its conclusion on the reasons advanced by the litigants. Certainly the adoption of a reason not specifically discussed by counsel cannot be properly characterized as a departure from the "accepted and usual course of judicial proceedings."

The contention of petitioners (Brief 13-17) that the Court of Appeals decided the point on a "patently erroneous" theory is lacking in merit. It necessarily proceeds upon the view that the 1882 Intertenant Agreement could not for any purpose be regarded as a part of the leases referred to in paragraph 37 of the 1902 Lease.

The Intertenant Agreement of November 1, 1882, was executed concurrently with five supplemental leases of the same date, to all of which reference was expressly made in its recitals (R. 197). The Intertenant Agreement and the supplemental leases are clearly interrelated, as a mere reading will demonstrate (R. 196-208). The critical paragraph 6th of the Intertenant Agreement makes use of the lease obligations in defining the "working expenses" which, by paragraph 5th of the agreement, are to be paid by the shareholder-lessees on a wheelage basis. Thus, the "working expenses" are defined as including every expense except Western Indiana's "mortgage debt and the interest thereon" (payment of which was provided for in the leases and supplemental leases), and except "such claims and demands as, under this agreement, or the leases and supplemental leases * * * should be paid exclusively by one of the parties of the second part [shareholder-lessees]" (See Appendix hereto).

The Supreme Court of Illinois has often held that two or more instruments executed contemporaneously by the same parties in relation to the same general subject matter may properly be construed together as one contract. *Bailey* v. *Cromwell*, 4 Ill. 71, 72; *Duncan* v. *Charles*, 5 Ill. 561, 565; *Bradley* v. *Marshall*, 54 Ill. 173, 174; *Gardt* v. *Brown*, 113 Ill. 475, 478; *Kirk* v. *Kirk*, 325 Ill. 296, 301; *Hagerman* v. *Schulte*, 349 Ill. 11, 20. Under the case last cited, it is immaterial that the mortgage trustees were parties to the supplemental leases but not to the Intertenant Agreement.

In the final analysis, however, the validity of the Court's ultimate conclusion, that paragraph 33 of the 1902 Lease did not supersede paragraph 6th of the 1882 Intertenant Agreement, is not dependent on paragraph 37 of the 1902 Lease; for, unless paragraph 33 and paragraph 6th are in conflict, there is no basis for the claim that the later paragraph superseded and abrogated the earlier one.

The function of paragraph 6th was to provide a comprehensive definition of the "working expenses" of Western Indiana, which by paragraph 5th were to be paid by the shareholder-lessees on a wheelage basis. Paragraph 33 did not purport to cover the field occupied by paragraph 6th. Notwithstanding the assertions of petitioners to the contrary, paragraph 33 did *not* provide a *definition* of the expenses distributable on a wheelage basis. It merely listed by categories the expenses—management, operation, maintenance, etc.—that were distributable on a wheelage basis; and, in this respect, it followed the similar provisions of prior leases (R. 189, 194), including the supplemental leases executed on November 1, 1882, concurrently with the Intertenant Agreement of the same date (Appendix hereto). Paragraph 33 of the 1902 Lease presumably was intended to perform the same function as the expense covenants of the supplemental leases executed

simultaneously with the 1882 Intertenant Agreement: namely, to furnish the mortgage trustee with additional security.

As was pointed out by this Court in *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 402, 420-3, decided four years prior to the execution of the Intertenant Agreement and the supplemental leases of 1882, it is often difficult to draw a line between expenses which are capital in nature and expenses in the field of management, operation and maintenance. Prior to November 1, 1882, the capital stock of Western Indiana was owned by its original promoters, but as of that date the five lessees of Western Indiana acquired, and they and their respective successors have ever since owned, all of the Western Indiana capital stock in equal one-fifth proportions (R. 196-7). Coincident with their acquisition of the capital stock, the shareholder-lessees and Western Indiana executed the Intertenant Agreement (R. 196-202). This agreement has a unique status in the contractual structure of the terminal enterprise. It is the only contract between the five shareholder-lessees which deals with their interests as shareholders and equal owners of Western Indiana and prescribes the necessary basis for the conduct of the joint enterprise.

The contention of the petitioners that paragraph 33 of the 1902 Lease provides the controlling test for determining what items of expense are distributable on a wheelage basis is merely preliminary to their claim that none of the expense items involved in the challenged decision is included in any of the categories of expenses listed in paragraph 33. In other words, their position is that paragraph 33 was intended not only to supplant paragraph 6th of the Intertenant Agreement, but also to reduce sharply the expenses for which Western Indiana was to be reimbursed by its shareholder-lessees on a wheelage basis. This argu-

ment, if accepted, would result in leaving entirely unprovided for expenses of Western Indiana now aggregating, according to the petition (p. 8), more than $455,000 annually; for there is nowhere in any lease or agreement between Western Indiana and its shareholder-lessees any provision for reimbursing Western Indiana for those expenses except upon the wheelage basis. This consideration alone should be conclusive against acceptance of petitioners' contention that paragraph 33 was intended to supersede the definition of "working expenses" in paragraph 6th.

It is only because of the *absence* of any *definition* in paragraph 33 that petitioners have been able to argue that none of the items of expense involved in this case falls within any of the categories mentioned in that paragraph. No reason has been yet adduced to support an interpretation of paragraph 33 which would justify the conclusion that the parties to the 1902 Lease intended to limit the expenses of Western Indiana which were to be borne by its shareholder-lessees on a wheelage basis, and to leave wholly unprovided for many of the expenses that paragraph 6th of the 1882 Intertenant Agreement had included in the "working expenses" of Western Indiana.

The contention that paragraph 33 of the 1902 lease supplanted paragraph 6th of the 1882 Intertenant Agreement has been twice considered by the Court of Appeals. It was first considered in the so-called capital stock tax case of *In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296, 300, where the Court held that none of the supplemental leases had in any way modified the covenants expressed in paragraph 6th of the Intertenant Agreement. The question was reconsidered in the present case, and again decided adversely to the contention of the present petitioners (Appendix to Petition 11).

The resolution referred to by petitioners (Brief 14-15)—adopted two years before the execution of the 1902 Lease—merely expressed the view that it would "be for the interest" of the parties that all existing contracts between Western Indiana and its shareholder-lessees be cancelled, and that the relations between them be covered by a new agreement (R. 780); but, as the proffered evidence further shows, the parties were later advised by counsel that the desired end could not be carried out, and the notion was definitely abandoned (R. 916-17).

Reply to Point II (Petition 21; Brief 17-18).

Petitioners advance as a second reason for the granting of the writ a contention which is wholly untenable. The contention is that the Court of Appeals stated that the case before it involved an ultimate question which it did not decide.

Although counsel for petitioners take pains (Brief 13) to point out that the Court of Appeals in its opinion "used the words 'lease' and 'agreement' as though they were synonymous," they assert that "existing leases," in the statement of the Court that "there is presented only the effect of the 1902 agreement on existing leases," must be literally interpreted—and this notwithstanding the fact that they concede that "1902 agreement" in the same statement had reference to the 1902 Lease. It is clear from the portions of the opinion following the statement in question (Appendix to Petition 9-11) that the question posed by the Court of Appeals in the statement pointed to by petitioners was the question of whether any of the provisions of the 1902 Lease had abrogated the definition of "working expenses" in paragraph 6th of the Intertenant Agreement of 1882. And *that* question was decided by the Court of Appeals.

Reply to Points III and IV of Petition (Pages 21-2) and Point III of Brief (Pages 18-24).

There is no conflict between the decision of the Court of Appeals in the three appeals covered by the petition filed in this Court and the decision of the Court of Appeals in the Erie appeal. The decision rendered on the appeal of Erie, relating to "management expenses," was that the Intertenant Agreement of 1882 was specifically modified, in one respect only, by paragraph 33 of the 1902 Lease: namely, by the *addition* of a clause, *which had no counterpart in paragraph 5th of the 1882 Intertenant Agreement,* and which provided for the use of sections in distributing the expense of management, operation, maintenance and other like expenses.

Paragraph 5th of the 1882 Intertenant Agreement provided that the shareholder-lessees should pay the "working expenses" of Western Indiana (which were defined in paragraph 6th) on a wheelage basis, but did not specify the *method* of distributing such expenses over the terminal property used in common by the shareholder-lessees. At and after the date of the execution of the 1882 Intertenant Agreement Western Indiana used and continued to use the sectional method of distributing "working expenses" (R. 258-9; 414); but it was not until 1902, when it became necessary to make a new mortgage to secure a new issue of bonds, that that method of distributing such expenses received written recognition. It is entirely possible that the shareholder-lessees took advantage of the opportunity afforded by the making of the Joint Supplemental Lease of that year to secure the assent of the mortgage trustee to the use of the sectional method.

The provision for distribution of wheelage expenses by sections, in paragraph 33 of the 1902 Lease, was merely *by way of supplement* to paragraph 5th of the 1882 Inter-

tenant Agreement, and in no way changed the definition of "working expenses" in paragraph 6th of the Intertenant Agreement. That definition, which drew the line between expenses regarded by the parties as capital in nature and all other expenses, "of every name, nature and description," is the only *definition* of wheelage expenses to be found in the contractual structure of the Western Indiana terminal enterprise. The Court of Appeals did not hold in the Erie appeal (No. 7878) that paragraph 6th was in any way affected by paragraph 33 or any other provision of the 1902 Lease.

The complaint of petitioners (Brief 22-4) that there is also a conflict within the challenged decision itself is predicated on the fact that the Court of Appeals finally accepted petitioners' contention as to one item of the expenses involved (Appendix to Petition 20-1). If there is a conflict in this respect, it is not one of which petitioners can rightfully complain.

Reply to Point V of Petition (Pages 22-3) and Point IV of Brief (Pages 24-8).

The novel suggestion is made that if this Court will take the case and reverse the Court of Appeals it will not be necessary for the District Court to hear and determine several subordinate questions which petitioners assert (erroneously, we believe) have not been decided. It is sufficient to say that courts are created in the interest of justice, and that we know of no authority for the proposition that a decision of an intermediate appellate court should be reversed for any such reason as that suggested.

Reply to Point VI of Petition (Pages 23-4) and Point V of Brief (Page 28).

The contention is made that the case is one of transcendent importance because of the length of time which the contracts and leases involved may continue in effect. The plain fact is that the only questions presented are questions of construction of Illinois contracts. These are questions of the substantive law of Illinois, and under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, are governed by the law of that state. *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 205; *American Crystal Sugar Co.* v. *Nicholas,* 124 F. 2d 477, 479 (C. C. A. 10th); *Black* v. *Richfield Oil Co.,* 41 F. Supp. 988, 993 (D. C. S. D. Cal.).

Petitioners have not been able to cite any decision of any Illinois court with which the decision of the Court of Appeals could possibly be said to conflict. The principle that a later covenant impliedly rescinds an earlier covenant covering the same subject matter if the two cannot subsist together—the principle announced in the decisions cited on pages 20 and 21 of petitioners' brief—was recognized by the Court of Appeals, and held not applicable because under no theory could paragraph 33 of the 1902 Lease be said to be in conflict with paragraph 6th of the 1882 Intertenant Agreement.

Conclusion.

It is respectfully submitted that petitioners have not shown any error in the decision of the Court of Appeals which is prejudicial to them, and that, in any event, they have not shown any departure by the Court of Appeals from the accepted and usual course of judicial proceedings,

or any other recognized or proper ground for the granting of a writ of certiorari.

Respectfully submitted,

JOHN C. SLADE,
FRANK H. TOWNER,
BRYCE L. HAMILTON,
38 S. Dearborn St.,
Chicago, Illinois.

H. V. SPIKE,
441 E. Jefferson Ave.,
Detroit, Michigan,
Attorneys for Respondent, Grand Trunk Western Railroad Company.

COPE J. HANLEY,
B. G. STACKHOUSE,
608 S. Dearborn St.,
Chicago, Illinois,
Attorneys for Respondents, Holman D. Pettibone, et al., Trustees of Chicago, Indianapolis & Louisville Railway Company.

APPENDIX.

Paragraphs 5th and 6th of the Intertenant Agreement of November 1, 1882 (R. 199-200):

"5th. The working expenses of the Western Indiana Company shall be paid by the parties of the second part hereto, and each of said parties hereby undertakes and agrees to pay monthly a proportion thereof, such proportion to be determined by the engine and car mileage of each party to the gross engine and car mileage of all the parties over those parts of the main line and property of the Western Indiana Company not set apart for the exclusive use of either: Provided, that the cost of maintaining and operating the passenger station, including the tracks south of said station to the first switch leading to a freight house or yard of any tenant of the lessor, shall be divided in proportion to the number of passenger cars and engines entering upon the same. And Provided Further, it is understood that nothing herein shall alter or affect the provisions of the lease of the lessor said Chicago & Eastern Illinois Railroad Company, dated October 24th, 1879, whereby the last named company is to pay three thousand dollars per annum in lieu of certain taxes and assessments therein mentioned. The car and engine mileage of the Chicago & Grand Trunk Railway Company shall be deemed to be that of the Grand Trunk Junction Railway Company.

"6th. The term 'working expenses,' as used in this agreement, shall include all taxes and assessments, ordinary and extraordinary, against the property of the Western Indiana Company, except that leased as aforesaid to the said Belt Railway Company, and property leased, or that may be leased, exclusively to one of the parties of the second part, or some other company or person; the cost of maintaining, repairing and renewing its railroad, tracks, buildings, and other property, in the common use of the parties of the second part; the expense of providing and maintaining gates, signals,

semaphores and lights, and of complying with any and all requirements that may be imposed by national, state or municipal authority; the expense of all service which the Western Indiana Company may have to employ; the cost of maintaining its corporate organization, and of protecting and defending its property, including suitable insurance thereof; all judgments against the Western Indiana Company and the expense of litigation, and all other claims and demands of every name, nature and description, for which the Western Indiana Company may be legally liable, excepting its mortgage debt and the interest thereon, and excepting therefrom, and from all the provisions of this paragraph, such claims and demands as, under this agreement, or the leases and supplemental leases between the Western Indiana Company and the several parties of the second part, should be paid exclusively by one of the parties of the second part. The cost of permanent improvements and of additions to the Western Indiana Company property shall not be deemed to be included in the term 'working expenses' as used in this paragraph."

Excerpts from Supplemental Lease to Eastern Illinois dated November 1, 1882 (R. 203-5). (*Each Supplemental Lease to the other four shareholder-lessees contained the same covenants, with such changes only as were necessary to specify in each the date of the lessee's prior lease*—R. 206.)

"Ninth. The lessee * * * shall and will pay to the lessor its proportion of the expenses incurred or paid by the lessor in maintaining its organization, and in maintaining and keeping in thorough repair and working condition the main track or tracks, passenger depot, terminal facilities and other property, the common use of which by the lessee, with the lessor and other companies lessees, is herein and by said lease of October 24th, 1879, and the supplemental lease of December 1st, 1880, has been reserved, and in supervising the use and managing the same, including all sums of money that the lessor shall pay or become

liable for by reason of the said lessor being the agency of said management and supervision, and also including that resulting from the negligence of any of the agents or employees employed in connection with said supervision and management and joint use, and also all moneys that the lessor may have to pay to, for or on account of the trustees under the provisions of said lease of October 24th, 1879, and the supplemental lease of December 1st, 1880, or the provisions of this supplemental lease, to the end that the lessor shall be fully reimbursed for every expenditure therewith connected, and other proper joint expenses and charges (including all taxes, assessments and special assessments whatever), upon or arising from the tracks, depots, terminal facilities and other property used in common, and the traffic over the same; such proportion to be determined by the engine and car mileage of the lessee and the other companies over those parts of the main line and property of the lessor not set apart for the exclusive use of any lessee, provided that the cost of maintaining and operating the passenger stations and tracks inside the station, including the tracks south of said station to the first switch leading to a freight house or yard of any lessee or tenant shall be divided in proportion to the number of passenger cars and engines entering upon the same; but it is also understood and agreed that this clause shall not alter or affect the provisions of the third article of the lease made by the lessor to the Chicago and Eastern Illinois Railroad Company, under date of October 24th, 1879, whereby the last named company is to pay $3,000 per annum in lieu of certain taxes and assessments therein mentioned."

* * * * *

"Thirteenth. The lessee shall and will, during the said term, and from time to time within thirty days after an account rendered, pay its proportion of all joint expenses incurred or paid by the lessor, in maintaining, repairing and keeping in good working order and condition the passenger depot, track, and other property which may be used in common under this

lease and the said lease of October 24th, 1879, and the supplemental lease of December 1st, 1880, and in supervising, managing and controlling the use of the same, and all expenses incurred or paid by the lessor, for or on account of the lessee, and for which the lessee may be exclusively liable; such payments to be made to the lessor at its principal office without any further demand being made therefor; but such accounts shall not be rendered oftener than once a month."

Paragraph 33 of the Joint Supplemental Lease of July 1, 1902 (R. 234):

"33. Operating Expenses Divided on Wheelage.) Eleventh. That after the date hereof the lessor shall exclusively manage, operate and maintain every portion of the common property; and the entire cost of the management, operation, maintenance, repair and renewal of, and of all taxes, liens, water rents and assessments on, said railroad, buildings and facilities, the common use of which is reserved to the parties hereto, and the entire cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, all enlargements and improvements thereof and additions thereto and on and to any other railroad hereafter acquired by the lessor for the common use of the parties hereto, shall be borne by said lessees in the proportion of their several wheelage uses of the various portions of said railroad to the total wheelage use thereof; and for the purpose of distributing such cost, the lessor shall divide by lines across and at right angles with its right of way, its said railroad and property, including all appurtenances, into such sections as may be necessary in order to equitably distribute such cost of the management, operation, maintenance, repair and renewal of, and all taxes, liens, water rents and assessments on, said several sections among the parties of the second part in proportion to their respective wheelage uses of such sections; and it may, from time to time, change such sectional divisions the better to subserve the purpose and intent aforesaid."